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**IN THE SUPREME COURT  
STATE OF ARIZONA**

IN THE MATTER OF A )  
PETITION TO AMEND SUPREME ) Supreme Court No. R - \_\_\_\_\_  
COURT RULE 42; ERs 5.5, 7.1, )  
and 7.3 ) Petition to Amend Supreme Court  
Rule 42; ERs 5.5, 7.1, and 7.3  
\_\_\_\_\_)

Pursuant to Rule 28, Ariz. R. Sup.Ct., the State Bar of Arizona ("State Bar") petitions the Court to amend Rule 42, Ariz. R. Sup.Ct., as set forth in the attached appendices.

**I. Overview and Summary of Proposed Changes**

The State Bar Board of Governors established the Consumer Information and Education Task Force ("task force") in early 2008 to examine and propose improvements to the communication of legal information and services to the public. The task force made a number of proposals for changes to the Rules of Professional Conduct related to advertising. The Board of Governors approved some of those proposals and now petitions this Court to adopt amendments to Ethical Rules 5.5, 7.1 and 7.3 and the comments thereto with the goal of

1 clarifying the current rules, including the nature of information that may be  
2 directed to consumers.

3 **A. ER 5.5 (Unauthorized Practice of Law)**

4 ER 5.5(b)(2) states that non-members of the State Bar are ethically  
5 precluded from holding themselves out to the public or otherwise represent that  
6 they are admitted to practice law in Arizona. The proposed comment would  
7 inform non-members that they may comply with ER 5.5(b)(2) by stating in any  
8 advertisement or communication that targets or specifically offers legal services  
9 to Arizona residents that the non-member's practice is limited to federal or Tribal  
10 legal matters.

11 The comment is intended to help non-members comply with Arizona's  
12 ethical rules when they advertise the availability of their services to Arizona  
13 residents. ER 7.1 prohibits a lawyer from using false or misleading  
14 communications about the lawyer or the lawyer's services. Prospective clients  
15 could reasonably assume that any lawyer or law firm advertising legal services to  
16 Arizona residents is ethically permitted to represent them regarding Arizona state  
17 law matters. Therefore, it would be inherently misleading for a non-member to  
18 fail to inform a prospective Arizona client that her or his practice is limited to  
19 federal or Tribal matters. The proposed amendments to ER 5.5 are set out in  
20 Appendix A.

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2       **B. ER 7.1 (Communications Concerning a Lawyer's Services)**

3       The State Bar proposes an amendment to the text of ER 7.1 as well as  
4 changes to two comments and the addition of two comments.

5       The proposed amendment to ER 7.1 would emphasize one of the basic  
6 tenets of the Rules of Professional Conduct: lawyers may not have someone else  
7 do what the lawyers themselves cannot do. ER 7.1 already prohibits a lawyer  
8 from making "a false or misleading communication about the lawyer or the  
9 lawyer's services." The amendment would additionally prohibit a lawyer from  
10 knowingly permitting such a communication to be made on the lawyer's behalf.

11       Although ER 8.4(a) already prohibits lawyers from violating or attempting  
12 to violate the Ethical Rules through the acts of another, the proposed amendment  
13 would make a direct connection between that tenet and the advertising rules. The  
14 proposed amendment also would make ER 7.1 consistent with ER 7.3(b), which  
15 currently prohibits lawyers from knowingly permitting others to engage in  
16 solicitation on the lawyers' behalf.

17       The State Bar also proposes to modify two current comments and add two  
18 comments to clarify the balance of ER 7.1, which provides that a communication  
19 is false or misleading "if it contains a material misrepresentation of fact or law,  
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1 or omits a fact necessary to make the statement considered as a whole not  
2 materially misleading.”

3       The proposed addition to Comment 1 would inform lawyers that “[a] clear  
4 and conspicuous disclaimer or qualifying language may preclude a finding that a  
5 statement is false or misleading.”

6       The proposed changes to Comment 3 would further clarify what may be  
7 considered a false or misleading communication. First, due to concerns that  
8 some lawyer advertisements and communications appear to promise or guarantee  
9 a particular outcome or result, Comment 3 should be amended to specifically  
10 state that “[p]romising or guaranteeing a particular outcome or result is  
11 misleading.”

12       Second, “appropriate disclaimer” in Comment 3 should be changed to  
13 “clear and conspicuous disclaimer” to make it consistent with the requirement in  
14 ER 7.2(f) that certain required communications be clear and conspicuous. The  
15 reference to ER 7.2(e)(1) should be deleted because no such provision exists in  
16 the current rules and the subject matter of current ER 7.2(e) does not pertain to  
17 the subject matter of Comment 3.

18       The proposed new Comment 5 would disclose the standard used to  
19 determine whether a communication is “false or misleading.” The task force  
20 considered the following standards: the “least-sophisticated person” (which is the

1 test for Arizona consumer fraud matters); an “ordinary person”; and a  
2 “reasonable person.” The State Bar recommends that the standard be that of a  
3 reasonable person. The task force settled on this recommendation because that is  
4 the standard set forth in Comments 2 and 3 to ER 7.1.

5 The proposed new Comment 6 references the proposed comment to ER  
6 5.5(b)(2) set forth above. Comment 6 would state that “[a] non-member’s failure  
7 to inform prospective clients that the lawyer is not licensed to practice law by the  
8 Supreme Court of Arizona or has limited his or her practice to federal or Tribal  
9 legal matters may be misleading.”

10 The text of the proposed rule changes is attached hereto as Appendix B.

11 **C. ER 7.3 (Direct Contact with Prospective Clients)**

12 The State Bar recommends three changes to the text of ER 7.3 and its  
13 comments.

14 First, as with the proposal to amend the text of ER 7.1, the State Bar  
15 proposes amending ER 7.3(a) to prohibit, in most instances, lawyers from  
16 knowingly permitting solicitation by others on the lawyer’s behalf by in-person,  
17 live telephone or real-time electronic contact where a motive for the lawyer’s  
18 doing so is the lawyer’s pecuniary gain. The amendment would clarify, once  
19 again without the need to refer to ER 8.4(a), that lawyers may not knowingly  
20 permit others to solicit employment from a prospective client on their behalf

1 when a motive for doing so is the lawyer's pecuniary gain, unless certain criteria  
2 are met. The proposed amendment would make paragraph (a) consistent with  
3 paragraph (b), which currently prohibits a lawyer from "knowingly permit[ing]  
4 solicitation on the lawyer's behalf."

5 Second, the State Bar recommends three changes to clarify ER 7.3(c) and  
6 the comments thereto, which among other requirements details the procedures  
7 lawyers must use when submitting copies of direct solicitations to the State Bar  
8 and this Court.

9 The first change would be deleting ER 7.3(c)(4)(B), which requires  
10 lawyers to verify the identity and knowledge of the specific need of the intended  
11 recipients of a communication or advertisement. There does not appear to be a  
12 need to "verify" the identity and knowledge of the specific legal need of the  
13 prospective client because ER 7.2(c)(4)(A) already requires lawyers to disclose  
14 how the identity and specific legal need of the intended recipients were  
15 discovered. Disclosure of the manner in which the lawyer discovered the  
16 identity and specific legal need of the intended recipient should be sufficient for  
17 the State Bar and recipients of a lawyer's communication to determine how the  
18 lawyer obtained the information and why the lawyer believes the recipient is in  
19 need of legal services regarding a particular matter. Furthermore, in many  
20 instances, there may be no way to "verify" the information without substantial

1 effort. In other instances, the need to verify would be superfluous. For example,  
2 if a lawyer receives information regarding court filings from a company that  
3 monitors the daily filings in a court clerk's office, there would be little benefit to  
4 requiring the lawyer to go to court to "verify" the information the lawyer was  
5 given.

6 The second proposed change is adding a comment to clarify the specific  
7 type of documents a lawyer must submit to the State Bar and this Court to  
8 comply with ER 7.3(c). The current rule requires lawyers to submit copies of ER  
9 7.3(c) solicitations to the State Bar and this Court at the time of dissemination.  
10 The proposed comment would provide that lawyers have two options for  
11 submitting these copies to the State Bar and the Supreme Court. Lawyers could  
12 either submit copies of every solicitation they send or they could comply by  
13 submitting "a single copy of any identical communication published or sent to  
14 more than one person and a list of the names and mailing or e-mail addresses or  
15 fax numbers of the intended recipients and the dates identical solicitations were  
16 published or sent." The comment also would clarify that lawyers could submit  
17 these documents to the State Bar on a monthly basis.

18 The third and final proposed change would add a comment to allow the  
19 State Bar to dispose of submissions received under ER 7.3(c) one year after  
20 receipt. Current ER 7.3(c)(1) does not state how long the State Bar must retain

1 these submissions and, as far as can be determined, the State Bar has never  
2 destroyed any submissions.

3 Because of the additions, some comments would be renumbered. The text  
4 of the proposed rule changes is attached hereto as Appendix C.

5 **II. Text of Proposed Rule Changes**

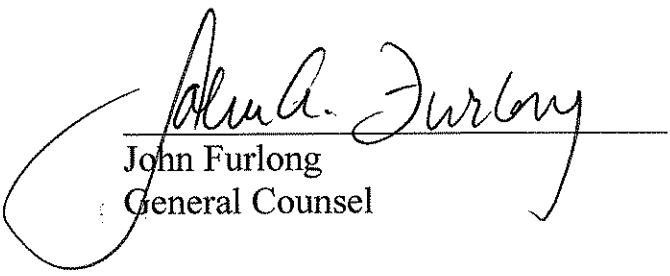
6 The text of the proposed rule changes are attached hereto in Appendices A,  
7 B, and C. The changes are shown in legislative format, with additions underlined  
8 and deletions shown with strikethroughs.

9 **III. Conclusion**

10 For the reasons set forth above, the State Bar of Arizona respectfully  
11 petitions this Court to amend Ethical Rules 5.5, 7.1 and 7.3 of Supreme Court  
12 Rule 42, as set forth in the Appendices. The State Bar believes these changes  
13 will clarify the advertising rules for lawyers and improve communications to the  
14 public.

15 Respectfully submitted this 12<sup>th</sup> day of January, 2009.

16 State Bar of Arizona

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18   
19 John Furlong  
20 General Counsel



Electronic copy filed with the  
Clerk of the Supreme Court of Arizona  
this 12<sup>th</sup> day of January, 2009.

by: Kathleen A. Lundgren

## **APPENDIX A**

## **ER 5.5. Unauthorized Practice of Law**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter.

are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or

are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) Any attorney who engages in the authorized multijurisdictional practice of law in the State of Arizona under this rule must advise the lawyer's client that the lawyer is not admitted to practice in Arizona, and must obtain the client's informed consent to such representation.

(f) Attorneys not admitted to practice in the State of Arizona, who are admitted to practice law in any other jurisdiction in the United States and who appear in any court of record or before any administrative hearing officer in the State of Arizona, must also comply with Rules of the Supreme Court of Arizona governing *pro hac vice* admission.

(g) Any attorney who engages in the multijurisdictional practice of law in the State of Arizona, whether authorized in accordance with these Rules or not, shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in the State of Arizona.

### **Comment**

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See ER 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

[2] Lawyers who are not members of the State Bar of Arizona may comply with paragraph (b)(2) by stating in any advertisement or communication that

targets or specifically offers legal services to Arizona residents that: (1) the non-member is not licensed to practice law by the Supreme Court of Arizona; or (2) the non-member's practice is limited to federal or Tribal legal matters (for example, a non-member may state his or her practice is limited to immigration matters).

## **APPENDIX B**

## **ER 7.1. Communications Concerning a Lawyer's Services**

A lawyer shall not make or knowingly permit to be made on the lawyer's behalf a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

### **Comment**

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by ER 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. A clear and conspicuous disclaimer or qualifying language may preclude a finding that a statement is false or misleading.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] Promising or guaranteeing a particular outcome or result is misleading. A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. ~~But see ER 7.2(e)(1).~~ Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of ~~an appropriate~~ a clear and conspicuous disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also ER 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Whether a communication about a lawyer or legal services is false or misleading is based upon the perception of a reasonable person.

[6] See comment to ER 5.5(b)(2) regarding advertisements and communications by non-members. A non-member lawyer's failure to inform prospective clients that the lawyer is not licensed to practice law by the Supreme Court of Arizona or has limited his or her practice to federal or Tribal legal matters may be misleading.



## **APPENDIX C**

### ER 7.3. Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client or employ or compensate another to do so when a motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment or knowingly permit solicitation on the lawyer's behalf from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer:

(2) the solicitation involves coercion, duress or harassment; or

(3) the solicitation relates to a personal injury or wrongful death and is made within thirty (30) days of such occurrence.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known or believed likely to be in need of legal services for a particular matter shall include the words "Advertising Material" in twice the font size of the body of the communication on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(1) at the time of dissemination of such written communication, a written copy shall be forwarded to the State Bar of Arizona at its Phoenix office;

(2) written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery;

(3) if a contract for representation is mailed with the written communication, the contract shall be marked “sample” in red ink and shall contain the words “do not sign” on the client signature line;

(4) the lawyer initiating the communication shall bear the burden of proof regarding the truthfulness of all facts contained in the communication, and shall, upon request of the State Bar or the recipient of the communication, disclose:

~~(A)—how the identity and specific legal need of the potential recipient were discovered; and~~

~~(B)—how the identity and knowledge of the specific need of the potential recipient were verified by the soliciting lawyer.~~

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

## **Comment**

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under ER 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under ER 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of ER 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in ER 7.3(a) and the requirements of ER 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of ER 7.1, which involves coercion, duress or harassment within the meaning of ER 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of ER 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a person as permitted by paragraph (c), the lawyer receives no response, any further effort to communicate with the person may violate the provisions of ER 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under ER 7.2.

[7] The requirement in ER 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Lawyers may comply with the requirement of paragraph (c)(1) by submitting (a) a copy of every written, recorded or electronic communication soliciting professional employment from a prospective client known or believed likely to be in need of legal services for a particular matter, or (b) a single copy of any identical communication published or sent to more than one person and a list of the names and mailing or e-mail addresses or fax numbers of the intended recipients and the dates identical

solicitations were published or sent. Lawyers may comply with the requirement of paragraph (c)(1) by submitting the required communications and information to the State Bar on a monthly basis.

[9] The State Bar may dispose of the submissions received pursuant to paragraph (c)(1) after one year following receipt.

[810] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with ERs 7.1, 7.2 and 7.3(b). See ER 8.4(a).